No. [redacted]

In the

United States Court of Appeals

For the Ninth Circuit

WALTER SELINGER,

Appellant,

vs.

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al,

Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

Appellant's Brief

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JURISDICTIONAL STATEMENT

This is an appeal by Walter Selinger, plaintiff below, from a final order entered on April 27, 1966, (R., Vol. I at 126), in favor of Lester Bigler and Robert Landesman, defendants below. A notice of appeal was filed on April 29, 1966. (R., Vol. I at 133).

Jurisdiction of this appeal exists under Title 28, U.S.C.A., Section 1291. Judisdiction of the District Court existed under Rule 41(e) of the Federal Rules of Criminal Procedure, 18 United States Code.

The appellant instituted this suit by filing a motion in the United States District Court for the District of Arizona for the return of property and to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure. (R., Vol. I at 1).

STATEMENT OF THE CASE

This action was brought by Walter Selinger in the form of a motion for the return of property and to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure. Plaintiff's motion contended that a Special Agent of the Internal Revenue Service, and an Internal Revenue Agent who accompanied the Special Agent, illegally photocopied Mr. Selinger's books, records and other memoranda in the course of a criminal income tax investigation of Mr. Selinger's business, a sole proprietorship. (R., Vol. I at 1).

A temporary restraining order was granted and an order to show cause hearing was set to determine the disposition of the motion to return property and to suppress evidence. (R., Vol. I at 21). Before the hearing was held on the motion, the defendants moved the Court for an order dismissing the proceedings. (R., Vol. I at 24). The motion to dismiss was taken under advisement by the Court. After the hearing, and in its opinion, the Court denied the defendants' motion to dismiss. (R., Vol. I at 129).

The evidence produced at the hearing revealed that two representatives of the Treasury Department came to Mr. Selinger's place of business and asked to see him on the morning of October 20, 1965. Since Mr. Selinger was not in when the Agents arrived, Lester Bigler, a Special Agent in the Internal Revenue Service, called Mr. Selinger on the telephone. Mr. Bigler did not identify himself or tell Mr. Selinger why he wanted to see him, except that he did iden-

tify himself and Mr. Landesman as "Government Men". The Agents made an appointment with Mr. Selinger for 12:30 P.M. on the same day. When the Agents arrived, Mr. Selinger took them into his private office, where Mr. Bigler showed Mr. Selinger his credentials, which contained his photograph and indicated that he was a Special Agent with the United States Treasury Department. (R., Vol. I at 127-128). Special Agent Bigler did not inform Mr. Selinger of his function with the United States Treasury Department. (R., Vol. II at 9). Mr. Selinger had never had any other prior dealings with Treasury Agents (R., Vol. II at 20), and he was not aware of the criminal functions of a Special Agent of the Internal Revenue Service. (R., Vol. I at 16). During this interview with Mr. Selinger, Mrs. Renee Selinger, the wife of Mr. Selinger, was also present. Rudy Boehmer, Mr. Selinger's office manager, was also present for a brief period during the interview. (R., Vol. I at 128).

There is substantial disagreement as to what was said by each of the parties during this interview. Both Treasury Agents testified that they told Mr. Selinger who they were and what they wanted, and that Mr. Selinger agreed to let them see all of his business records. On the other hand, Mr. Selinger testified at the hearing that he did not grant permission to the Agents to see his records. (R., Vol. I at 128). Mrs. Selinger's testimony confirmed her husband's statement of the facts. (R., Vol. II at 55).

That same afternoon, both Agents went to the office of Sidney Markow, Mr. Selinger's accountant, and photocopied all of Mr. Selinger's records that were in the accountant's possession. On the following day, October 21, 1965, the Agents returned to Mr. Selinger's place of business and photocopied many of his remaining records. (R., Vol. I at 128). When Mr. Selinger subsequently learned that the

Agents had returned and were copying his records, he contacted a business friend who requested a tax attorney, Harold W. Wales, to contact Mr. Selinger. After speaking briefly with Mr. Selinger, Mr. Wales then talked to Mr. Bigler and, as a result, Mr. Bigler then agreed to leave the premises. (R., Vol. II at 17-19).

After the hearing was concluded, Mr. Selinger retained new counsel, who petitioned the Court to reopen the hearing in order to present the testimony of Mr. Selinger's previous attorney, Harold W. Wales. (R., Vol. I at 65). Although the parties were willing to stipulate that Mr. Wales would testify to exactly what was in his affidavit attached to the motion to reopen, the District Judge decided that he wanted to cross-examine Mr. Wales. (R., Vol. V at 46). Mr. Wales then testified that he called Mr. Bigler on October 21, 1965, and told Mr. Bigler to stop photographing the records. Since Mr. Wales had a client with him in his office, he was not anxious to prolong the conversation. Mr. Wales then excused himself from the client and called Mr. Bigler back and asked for a return of the records that had been photographed. (R., Vol. V at 49). Mr. Bigler testified that he told Mr. Wales that he had permission to examine the books and records of Mr. Selinger during both the first and second telephone conversations. (R., Vol. III at 22-23). Mr. Wales, however, testified that Mr. Bigler made no mention about permission to examine the books and records during either of these telephone conversations. (R., Vol. V at 50, 52).

The Court denied the motion for the return of property and to suppress evidence. In so holding, the Court stated:

> "As to the facts themselves, the Court finds: that the petitioner was initially advised by the defendants that one of them was a Special Agent for the Internal Revenue Service; that the other was an Internal Revenue

Service Agent; that they wished to see his business records for the purpose of investigating his tax returns; that petitioner was advised by the defendants that he would not have to show them his records and that he would not have to give them any information if he did not so desire. Nevertheless, the Court finds that petitioner agreed that the defendants could examine his business records, which were subsequently photocopies by the defendants, and that petitioner did so voluntarily without any threats or promises of any kind being made to him by the defendants.

"Since all of the records photocopies by the defendants were obtained with the consent of petitioner, the Court denies petitioner's motion to suppress this evidence and denies the request that this evidence so photocopied be returned to petitioner, and it is so ordered." (R., Vol. I at 129-131).

The District Court did not discuss Mr. Wale's testimony in its opinion.

SPECIFICATIONS OF ERRORS

1. The District Court erred in denying the motion to return property and to suppress evidence because the Court failed to find that Mr. Selinger waived his rights under the 4th Amendment to the United States Constitution.

2. The District Court erred in holding that none of Mr. Selinger's constitutional rights had been violated because Mr. Selinger was not advised of his right to counsel .

3. The District Court erred in holding that Mr. Selinger consented to the examination and photocopying of his books and records.

ARGUMENT

I. The District Court Failed to Find That Mr. Selinger Waived His Constitutional Rights.

Under the 4th and 5th Amendments to the United States Constitution, Mr. Selinger had the right to remain silent as

well as the right to prevent the Government from examining his books and records. The District Court found that Mr. Selinger waived these rights by voluntarily agreeing to let the Internal Revenue Agents examine his records. In order to prove consent, the Government must show that the consent was "unequivocable and specific" and "freely and intelligently given". *Greenwell v. United States,* 336 F.2d 962, 967 (D.C.Cir. 1964). In *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the Supreme Court stated at page 464:

> "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

See also *Hubbard v. Tinsley,* 336 F.2d 854 (10th Cir. 1954); *Pekar v. United States,* 315 F.2d 319 (5th Cir. 1963); *McDonald v. United States,* 307 F.2d 272 (10th Cir. 1962).

This rule has been followed by the Ninth Circuit. In *Channel v. United States,* 285 F.2d 217, 219-220 (9th Cir. 1960), the Court stated:

> "A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied. The Government has the burden of proving by clear and positive evidence that such consent was given. Judd vs. United States, 89 U.S. App. D.C. 64, 190 F.2d 649, 650."

See also *State of Montana v. Tomich,* 332 F.2d 987 (9th Cir. 1964).

The District Court failed to determine whether Mr. Selinger had waived his constitutional rights under the 4th

Amendment. Instead, the Court merely found that Mr. Selinger agreed that the Agents could examine his business records.

> "Nevertheless, the Court finds that petitioner agreed that the defendants could examine his business records, which were subsequently photocopied by the defendants, and that petitioner did so voluntarily without any threats or promises of any kind being made to him by the defendants.
>
> "Since all of the records photocopied by the defendants were obtained with the consent of petitioner, the Court denies petitioner's motion to suppress this evidence and denies the request that this evidence so photocopied be returned to petitioner, and it is so ordered." (R., Vol I at 130-131).

The Court simply believed the testimony of the two Treasury Agents and found that Mr. Selinger had consented to the examination of his books and records. However, the Court erred by not determining whether Mr. Selinger had waived his constitutional rights. In the recent case of *Cipres v. United States,* 343 F.2d 95, 97-98 (9th Cir. 1965) this Court again addressed itself to the question of waiver:

> "But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context, means the 'intentional relinquishment of a known right or privilege.' Johnson vs. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively

> withheld. We recently sustained a district court finding that such waiver was lacking despite an express verbal consent, and such cases are common. They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did.
>
> "Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege."

As in *Cipres,* both Mr. and Mrs. Selinger denied that consent was given to examine their records. However, such consent, if present at all, was obtained "under color of the badge" (in this instance a Treasury badge) and therefore presumptively coerced. *United States v. Page,* 302 F.2d 81 (9th Cir. 1962).

It is also important to realize that we are dealing with a criminal tax fraud investigation and that the investigation was criminal from its inception. In *Cipres,* the defendant Cipres knew that she consented to having her bags searched by criminal law enforcement officials in uniform, and that any evidence found could incriminate her. On the other hand, Mr. Selinger was never informed that he was being criminally investigated, and the testimony is clear that he was not aware of the function of a Special Agent of the Internal Revenue Service. (R., Vol. I at 16). Since Mr. Selinger did not realize that he could be incriminating himself by consenting to the examination of his records, his consent was not intelligently given, "and the consent cannot be deemed voluntary, unless it be made clearly to appear

that it was freely and intelligently given". *Kovach v. United States,* 53 F.2d 639 (6th Cir. 1931). See also *United States v. Page,* supra.

Since the District Court only found that Mr. Selinger agreed to the examination of his records, this case should be reversed and remanded with instructions to the District Court to determine whether Mr. Selinger freely and intelligently waived his constitutional rights.

II. Before a Taxpayer Can Be Questioned by a Special Agent of the Internal Revenue Service, Whose Duty Is to Investigate Criminal Tax Fraud, the Taxpayer Must Be Informed of His Right to Counsel.

The District Court did not find as a fact that Mr. Selinger was informed of his right to obtain counsel. Moreover, there is no evidence in the record to indicate that he was so informed. By failing to inform Mr. Selinger of this right, the Government Agents deprived him of his rights under the 6th Amendment to the United States Constitution.

Plaintiff submits that whenever a Special Agent of the Internal Revenue Service enters a case, the taxpayer must be informed of his right to counsel. If he is not so informed, any statements he may make or any records seized by the Government with his consent may not be used against him. In *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the Supreme Court held that the defendant had been denied the assistance of counsel in violation of the 6th Amendment at the time the investigation had begun to focus on a particular suspect.

In tax matters, the accusatory stage begins when a Special Agent is assigned to a case because the function of a Special Agent is to investigate criminal tax fraud.[1] As ex-

1. Balter, "Special Agents Need Not Advise a Taxpayer of His Constitutional Rights", *The Journal of Taxation,* July, 1966 at pp. 26, 27.

plained by a distinguished former Department of Justice official:

> "The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the revenue agent. He is exactly the same as any other Treasury Agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A special agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant."

Burns, *Searches and Seizures: The Suppression of Evidence,* N.Y.U. 20th Institute on Federal Tax 1081, 1087 (1962). See also Reg. 1118.6, Statement of Organization and Functions of Intelligence Division, C.C.H. 1965, Standard Federal Reporter Paragraph 5988 (March 24, 1965), in which it is stated that the Intelligence Division enforces the criminal statutes applicable to income tax laws.

Special Agents have the same authority as agents of the FBI with respect to arresting individuals, as well as serving warrants and subpoenaes, except that Special Agents are not given the right to carry weapons.[2] Moreover, the authority of Special Agents is exclusive since even the FBI is not authorized to investigate criminal tax fraud.[3]

Although an investigation conducted by Special Agents is entirely a criminal one, this fact is rarely known by the taxpayer. When the police or the FBI question an individual, their credentials and appearance identify them as Government Agents who are concerned with criminal law en-

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2. Compare 18 U.S.C. 3052 with 26 U.S.C. 7608(b).

3. Balter cited at footnote 1.

forcement. However, even though a Special Agent may identify himself and present his credentials, this does not apprise the taxpayer that he is being criminally investigated.[4]

Since a criminal investigation begins when the Special Agent enters the case, and his function is to gather incriminating evidence, the accusatory stage has begun within the meaning of the *Escobedo* case. The taxpayer is therefore entitled to the right to counsel when the Special Agent commences his investigation.

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4. The appearance of a Special Agent does not reveal his function because he wears a business suit. Also, the credentials of a Special Agent do not indicate that his function is to investigate criminal tax fraud. The credentials shown by Mr. Bigler gave no indication that he was a criminal investigator.

"Q. By Mr. Fuerth: Mr. Selinger, is that the identification that was shown to you?

A. Well, it is similar to what he showed me. I wouldn't swear it was the same one or not.

Q. Could you read what is on there, Mr. Selinger?

A. I said I didn't read the thing.

Q. No, would you read that one.

A. 'U.S. Treasury Department'. Underneath it says, 'Internal Revenue Service', but I looked at the, I looked at the picture.

Q. What else does it say?

A. 'Lester A. Bigler'.

Q. What else? Read the whole thing.

A. I don't see anything else.

Q. Isn't there some writing below that?

A. I never saw that part, sir.

Q. I am asking you to read the whole thing to the Court.

A. I didn't see this part at all.

The Court: Just answer the question.

A. 'Lester A. Bigler, whose signature and picture appears above, is duly commissioned special agent, and authority to perform all duties conferred upon such officers under all laws and regulations'.

There is a stamp if I can see it, 'Administered by the Internal Revenue Service, including the authority to investigate, to inquire and receive information as to all matters relating to such laws and regulations'." (R., Vol. II at 23-24).

The main reason the Special Agent interviewed Mr. Selinger was to obtain his permission to examine his books in order to find incriminating evidence. Since most successful criminal tax prosecutions are founded upon the taxpayer's own records, the critical time for the advice of an attorney is when a Special Agent requests permission to examine a taxpayer's books and records. As pointed out by the Supreme Court in *Escobedo:*

> "Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so.
>
> "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. Powell vs. Alabama, 287 U.S. 45, 69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 84 ALR 527. This was the 'stage when legal aid and advice' were most critical to petitioner. Massiah vs. United States, supra, 377 U.S. at 204, 12 L. Ed. 2d at 249.
>
> "What happened at this interrogation could certainly 'affect the whole trial', Hamilton vs. Alabama, supra, 368 U.S. at 54, 7 L. Ed. 2d at 116, since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes'." 378 U.S. 478 at 485-486.

A comparison of tax fraud cases with other criminal prosecutions supports the contention that the right to counsel attaches when the Special Agent begins his investigation. James O. Hewitt, in his recent article entitled, *"6th Amendment Rights of the Taxpayer in a Fraud Investigation"*, Bulletin of the Section of Taxation, American Bar Association, January, 1966, at Page 123, states:

> "Taken step by step it becomes apparent that tax fraud cases simply do not follow the traditional pattern of most criminal prosecutions. In the typical criminal

case, step one is knowledge that a crime has been committed. Step two involves the search for suspects and finally step three is the focusing on the accused as the prime suspect. Right to counsel attaches at step three according to *Escobedo.*

"In the tax fraud cases, however, step one is *not* usually knowledge that a crime has been committed but rather a routine audit for the purpose of determining a civil matter having no criminal ramifications of any kind. Step two in the tax case is a suspicion of fraud by the revenue agent often approximating a tentative conclusion on his part that fraud has been committed, and a recommendation that the case be assigned to the Intelligence Division. This, it is suggested, is the fraud equivalent of knowledge that a crime has been committed. Finally, there is step three which is the fraud investigation itself—an investigation aimed not at narrowing down the list of suspects since there is only one suspect—but rather at gathering evidence to prove conclusively in their minds that the one suspect (the taxpayer) has in fact committed the crime of tax evasion.

"The difficulty conceptually is that in the fraud case, as in almost no other, absolute proof of the crime having been committed is also absolute proof that the taxpayer is guilty of it. Thus, to accord the taxpayer constitutional protections only after the existence of the crime has been conclusively proven is to accord him no protection whatever. For this reason it is believed that the taxpayer should be considered the 'accused' within the meaning of *Escobedo* at that moment when a suspicion of fraud is effectuated by a fraud investigation and that the right to counsel should attach at this time. Only by so doing can the taxpayer be afforded the same protections accorded to suspects in other areas of the law."

The Ninth Circuit's opinion in *Kohatsu v. United States,* 351 F.2d 898 (9th Cir. 1965) should not control this case

because *Kohatsu* involved a different factual situation. In the present case, Mr. Selinger was investigated initially by a Special Agent on the basis of an informer's letter. (R., Vol. I at 132). Therefore, criminal tax fraud was involved from the inception. On the other hand, in *Kohatsu,* the defendant was originally investigated by a Revenue Agent during a routine audit; later, a Special Agent was called in to pursue the matter criminally. The Court in *Kohatsu* relied upon *United States v. Sclafani,* 265 F.2d 408 (2nd Cir. 1959), to the effect that it would be:

> "Unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose." 265 F.2d at 415.

In our case, there is no problem in determining when a routine tax audit ended and a criminal investigation commenced, since the one and only investigation involved here was criminal.

Moreover, *Kohatsu* was decided prior to the recent case of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966). In *Miranda,* the Supreme Court held that "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed". 16 L.Ed.2d 694 at 706-707. We submit that this rule should apply equally to Special Agents of the Treasury Department, as well as to the Federal Bureau of Investigation and local law enforcement officials.

In *Miranda,* the defendant was given the right to counsel in order to protect his 5th Amendment privilege against

self-incrimination. Or, as expressed by the Court in *Miranda,* there was a "need for counsel to protect the Fifth Amendment privilege". 16 L.Ed.2d 694 at 721. The same philosophy is just as applicable here. Since an individual cannot properly waive his 5th Amendment rights without the assistance of an attorney, Mr. Selinger also was entitled to counsel in order to properly waive his rights under the 4th Amendment. Since Mr. Selinger did not know the function of a Special Agent and was not aware that he had the right to prevent the Special Agent from examining his books and records, he needed the assistance of counsel to properly advise him of his constitutional rights. Telling him that he could remain silent and that he did not have to give up his books and records is not sufficient to protect a taxpayer who is not aware of his constitutional rights. As pointed out by the Supreme Court in *Miranda:*

> "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel. As the California Supreme Court has aptly put it:
>
> " 'Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it.' People vs. Dorado, 62 Cal.2d 338, 351, 398 P.2d 361, 369-370, 42 Cal.Rptr. 169, 177-178 (1965) (Tobriner, J.)."

The rationale and philosophy of *Miranda* require that a Special Agent of the Treasury Department must inform an

individual of his right to counsel before the interrogation begins. A person, whether he be an alleged murderer, rapist or tax evader, should be properly apprised of his constitutional rights, and this should be true whether he is being investigated by the FBI, a Special Agent of the Treasury Department or any other law enforcement official. Since the FBI presently informs an individual fully of his rights, including the right to counsel, should the Treasury Department be held to a lower standard?

In emphasizing the practices of the FBI, the Supreme Court in *Miranda* stated:

> "Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay." 16 L.Ed.2d at 728-729.

Although Mr. Selinger was not arrested, he was clearly a suspect and, therefore, he should have been advised of his right to counsel.

In its opinion, the Supreme Court in *Miranda* also deplored police manuals which advocated the use of various techniques to be employed by policemen in order to get a suspect to incriminate himself. It would be interesting and revealing if this Court successfully requested that the Government produce the Internal Revenue Manual.[5] An exam-

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5. In an unreported Order of District Judge Walter E. Craig, in the case of *United States of America and Bennett Y. Brewer, Special Agent v. Gerald Rosen,* No. Civ-5739—Phoenix, Arizona, the Court ordered the Government to produce for inspection the Special Agent's Operating Manual as it relates to the Special Agent's job description and his day to day investigative functions,

ination of this Manual would probably reveal that, unlike the FBI, the Internal Revenue Service is more interested in successfully concluding an investigation, rather than insuring that a suspect is properly informed of his rights. Two excerpts from this Manual indicate that the rights of an individual are clearly secondary to the accomplishment of a successful investigation. See Walter E. Dillon, "*When Your Client is Under Federal Investigation*", the Practical Lawyer, November, 1965, at page 53, and December, 1965, at page 78:

> "Consider the following language found in section 9385.1 of the Internal Revenue Manual (May 2, 1955), which contains instructions for revenue agents:
>
> > " 'When it appears that a natural person may be a possible defendant in a criminal trial, positive steps shall be taken to assure that any evidence he submits is submitted voluntarily or (sic) that he knows and understands, before he submits orally or otherwise, any such evidence, that he is not required to furnish evidence which he believes might incriminate him directly or indirectly under any law of the United States. When appropriate, he should be informed of these rights. *This information should not be given in language so formal, or so couched as to unnecessarily alarm the person interviewed.* (Emphasis (italics) added). Deception, fraud or deceit will not be practiced to obtain such evidence'."
>
> "The following language of section 9353 (4) of the Internal Revenue Manual is somewhat revealing of the attitude of the investigators on the furnishing of statements:
>
> > " 'A copy of a signed affidavit or transcript of a question and answer statement shall be furnished the witness. However, delivery of such document

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and any other relevant matters contained therein. Rather than produce this Manual, the Government dismissed its action against Mr. Rosen (November 22, 1965 Order of Judge Craig).

> may be accomplished at such time which will not hamper the investigation or hinder a successful trial of the case'."

These two excerpts indicate rather graphically that Special Agents are not concerned with protecting the rights of the individual, and therefore, an attorney is clearly needed to protect such rights.

III. Mr. Selinger Did Not Voluntarily Consent to the Examination and Photo Copying of His Books and Records.

The District Court's decision was clearly erroneous in determining that Mr. Selinger had voluntarily consented to the examination of his books and records. Although the two revenue agents both testified that Mr. Selinger consented to the examination of his books and records, both Mr. and Mrs. Selinger, as well as Rudy Bohmer, Selinger's bookkeeper, denied that such permission was given. The Court was thus faced with the credibility of these five witnesses.

Although Mr. and Mrs. Selinger were directly contradicted by the revenue agents, Mr. Bigler, the Special Agent, was contradicted by third party witnesses, as well as the Selingers. Mr. Bigler testified that Mr. Selinger told him in the presence of Rudy Bohmer that it was his understanding that Mr. Selinger intended to cooperate and allow Mr. Bigler to examine his books and records. (R. Vol. III at 13). Mr. Bohmer denied that any such statement was made. (R. Vol. II at 89 and 97).

Mr. Bigler testified that he told Sidney Markow on October 20, 1965, that Mr. Selinger had told him that he could examine the books and records. (R. Vol. III at 14). On the contrary, Mr. Markow testified that Mr. Bigler only stated that Mr. Selinger had told Bigler that he, Markow, had all the books and records. (R. Vol. II at 78).

Mr. Bigler's testimony was also in direct conflict with that of Harold Wales. Mr. Bigler testified that on October 21, 1965, while at Mr. Selinger's office, he stated to Mr. Wales over the telephone that he had permission to examine the books and records of Mr. Selinger. (R. Vol. II at 22). Wales testified that Bigler made no mention during his conversation on October 21, 1965, that permission had been granted by Selinger to Bigler to examine the books and records. (R. Vol. V at 48 through 56). Furthermore, Bigler testified that during the second telephone call from Mr. Wales on the same date, Mr. Wales had asked by what authority Mr. Bigler was copying the books and records, and that Bigler again explained that Mr. Selinger had given him permission to examine such records. (R. Vol. III at 22-23). Mr. Wales testified specifically that in the second telephone conversation with Mr. Bigler, he only asked that the microfilm of the books and records be turned over to Mr. Selinger before Mr. Bigler left. (R. Vol. V at 48-56).

Not only did Mr. Wales' testimony directly conflict with that of Mr. Bigler, but it is inconceivable that Mr. Bigler would inform Mr. Wales during the first telephone conversation that he had permission to examine the records and then, during the second conversation, Mr. Wales would again ask Mr. Bigler by what authority he was photographing the records.

The government had the burden of proving by clear and convincing evidence that Mr. Selinger waived his constitutional rights. See *United States v. Martin,* 176 F. Supp. 262, 266-267 (S.D. N.Y. 1959) where the Court stated:

> "Consent to a search may constitute a waiver of the rights secured by the Fourth Amendment. See United States v. Dornblut, 2 Cir., 261 F.2d 949; United States v. Gross, D.C.S.D.N.Y., 137 F. Supp. 244; United States v. Reckis, D.C.D. Mass., 119 F. Supp. 687. Cf. United

> States v. Sclafani, 2 Cir., 1959, 265 F.2d 408. However, in order for consent to constitute a waiver the burden is on the United States to show by clear and convincing evidence that it is unequivocal and specific and freely and intelligently given. United States v. Reckis, supra; United States v. Wallace, D.C.D.C., 160 F. Supp. 859. It must be affirmatively shown that there was no duress or coercion, actual or implied."

Because Mr. Bigler was contradicted by a number of third party witnesses, his testimony could not have been "clear and convincing." The District Court's opinion was thus clearly erroneous in finding that the Government had carried its burden of proving that Mr. Selinger had consented to the examination of his records.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order denying appellants' motion for the return of property and suppression of evidence be reversed, and the cause remanded with instructions to enter an order to return property and suppress evidence.

David R. Frazer
John C. King
Shimmel, Hill, Kleindienst & Bishop

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

David R. Frazer

(Appendix Follows)

Appendix

TABLE OF EXHIBITS

Exhibit No.	Description	RECORD PAGE NO. Identified	Offered	Received	Rejected
PLAINTIFF'S:					
1	Summons issued Nov. 12, 1965 to First Federal Savings & Loan Assoc. Chris-Town Office	Vol. V at 14	Vol. V at 14	Vol. V at 14	
2	Summons issued Nov. 17, 1965 to Southwestern Investment Company	Vol. V at 16	Vol. V at 16	Vol. V at 16	
3	Summons issued Nov. 4, 1965 to First National Bank at 24th and Indian School	Vol. IV at 23	Vol. IV at 23	Vol. IV at 24	
4	Summons issued Nov. 5, 1965 to First National Bauk at 24th and Indian School	Vol. IV at 23	Vol. IV at 23	Vol. IV at 24	
5	Summons issued Nov. 2, 1965 to First Fed. Savings & Loan Sunnyslope Office	Vol. IV at 30	Vol. V at 19	Vol. V at 19	
6	Summons issued Oct. 26, 1965 to Irving Nussbaum	Vol. VI at 12	Vol. VI at 14	Vol. VI at 16	
7	Summons issued Nov. 3, 1965 to Valley National Bank	Vol. VI at 12	Vol. VI at 14	Vol. VI at 16	
8	Summons issued Nov. 4, 1965 to First National Bank of Arizona	Vol. VI at 12	Vol. VI at 14	Vol. VI at 16	
9	Summons issued Nov. 8, 1965 to Allied Building Credits	Vol. VI at 12	Vol. VI at 14	Vol. VI at 16	
10	Copies of Sign-out Register	Vol. VI at 5			
DEFENDANT'S:					
A	Copies of sign-out register of Intelligence Division Nov. 12, 15, 16, 17 and 19 of 1965	Vol. IV at 5	Vol. IV at 5	Vol. IV at 11	